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COMMUNIQUÉ

FEDERAL COURT ARTICULATES TEST FOR FAMILY STATUS DISCRIMINATION

Most Canadian jurisdictions have legislation that protects individuals from discrimination based on family status. Courts, tribunals and arbitrators have struggled with whether family status includes family obligations and, if so, how serious the conflict must be, between those obligations and workplace requirements, before discrimination requiring employer accommodation can be said to occur. Two recent decisions of the Federal Court, Johnstone and Seeley, confirm that family status includes childcare obligations. They also confirm that the legal tests for finding discrimination are no different for family status than they are for other grounds of discrimination.

Principles

The Federal Court noted that family status discrimination cases considered in the jurisprudence identified a wide range of family responsibilities creating conflicts that were claimed to require accommodation. These included karate lessons, out-of-town hockey tournaments, attendance at a spouse's medical appointments, assisting family members with the immigration process and a preference to be at home with a pre-school child. The breadth of these claims prompted some courts to impose a type of seriousness threshold before discrimination can be said to occur. The Federal Court rejected the idea of a stricter test for family status discrimination than would apply for other types of discrimination, holding that discrimination occurs "when an employment rule or condition interferes with an employee's ability to meet a substantial parental obligation in any realistic way".

The Federal Court also confirmed the holding of several Canadian courts and tribunals that family status includes childcare obligations. The Federal Court noted that the childcare obligations, upon which a claim of discrimination is founded, must be those "of substance" and the complainant must have tried to "reconcile" family obligations with work obligations.

In Seeley the Federal Court articulated the questions to be asked in order to determine whether discrimination has occurred:

"a. does the employee have a substantial obligation to provide childcare for the child or children; in this regard, if the parent the sole or primary care giver, is the obligation substantial and one that goes beyond personal choice;
b. are there realistic alternatives available for the employee to provide for childcare: has the employee had the opportunity to explore and has explored available options; and is there a workplace arrangement, process, or collective agreement available to the employee that may accommodate an employee's childcare obligations and workplace obligations;
c. does the employer conduct, practice or rule put the employee in the difficult position of choosing between her (or his) childcare duties or the workplace obligations?"

Once discrimination is established, there are a number of defences that an employer can raise to show that the discrimination is justified. The employer may be unable to accommodate the employee's needs. The conflict complained of may be a *bona fide* occupational requirement. The employers in Johnstone and Seeley did not raise any defences, because they alleged that there had been no discrimination at all. In Johnstone, the employer advanced a blanket policy against any type of accommodation for childcare duties and did not inquire into the complainant's individual circumstances. In Seeley, the employer did not speak with the complaint or attempt any discussion the issue of accommodation. In both cases, the employers failed to engage with the employees and seek any type of work-around with respect to the childcare difficulties of the employees.

Practice

In court, an employee must bring evidence to prove a case of discrimination. Accordingly, an employee who seeks accommodation from their employer for a parental duty conflict should be ready to disclose the facts that demonstrate the duty and lack of realistic alternatives. The courts have made it very clear that an employer who receives a request for accommodation for parental duty must make an assessment of the employee's request based on the facts of the particular case. A blanket policy is not acceptable; neither is refusal to engage with the employee in any meaningful way.

If the employer is satisfied that the employee has a claim for discrimination, then the employer must explore accommodation options, based on the same rules that apply for other types of discrimination. The employer who believes that accommodation would impose undue hardship should be prepared to demonstrate that the workplace options have been examined in detail and why they don't work.

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